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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 MICHAEL STEVEN NOVAK,

12 Plaintiff,

13 v.

14 JAMES THATCHER,

15 Defendant,  
16

Case No. C08-5711BHS/JRC

REPORT AND  
RECOMMENDATION

**NOTED FOR:**  
September 18, 2009

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18 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned  
19 Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local  
20 Magistrate Judges' Rules MJR 1, MJR 3, and MJR 4. Plaintiff challenges his transfer to an  
21 out of state facility. Plaintiff alleges that the transfer was in retaliation for litigation he and  
22 other inmates filed against prison officials (Dkt. # 1). Plaintiff is not proceeding *in forma*  
23 *pauperis* and paid the full filing fee.

24 A non-party to this action repeatedly submitted pleadings on the Plaintiff's behalf.  
25 The Court warned Plaintiff regarding these filings. The Court did not consider several of  
26 the attempted filings. Attempts to amend the complaint failed when Plaintiff filed two  
REPORT AND RECOMMENDATION- 1

1 unsigned amended complaints. (See Dkt. # 26, 27, 33, 36, and 37). Ultimately, the Court  
2 withdrew leave to amend the complaint (Dkt. # 37). The complaint in this action is the  
3 original complaint that names only James Thatcher as the Defendant (Dkt. # 1).

4 Mr. Thatcher moves for Summary Judgment (Dkt. # 40). Plaintiff did not respond to  
5 the motion. Pursuant to Local Rule 7, failure to respond to a motion may be taken by the  
6 Court as an admission that the motion has merit.

### 8 FACTS

9 Plaintiff alleges that as a result of prior litigation, defendant made a decision to  
10 transfer him out of state (Dkt. # 1). Defendant moves for Summary Judgment and he states:

11 James Thatcher is currently employed by the Washington State DOC as the  
12 Superintendent over the placement of Washington inmates in facilities outside  
13 of Washington. Mr. Thatcher has worked for DOC for over 37 years and has  
14 been involved in the out-of-state placement of Washington inmates for over 30  
15 years. See Exhibit 1, Declaration of James E. Thatcher.

16 For several years DOC has had a need to house Washington inmates in  
17 correctional facilities outside of Washington due to a lack of space in  
18 Washington's correctional facilities. In 2007 DOC had a need to send several  
19 hundred Washington inmates to Minnesota and therefore developed an objective  
20 set of criteria to try to identify appropriate candidates for this out-of-state  
21 placement. DOC Headquarters staff created a list of DOC inmates who met the  
22 basic criteria for transfer out of state (age, medical condition, time left to serve,  
23 etc.) and then sent the names of the inmates on the list to DOC's institutions for  
24 additional, more detailed screening. Institution staff were asked to interview  
25 each offender individually and ask various questions designed to determine their  
26 appropriateness for out-of-state placement. These questions included questions  
about scheduled court appearances, the number of visits they had, transfer  
holds, industries employment, possible Indeterminate Sentence Review Board  
hearings, programming, and whether or not the inmate volunteered to be  
transferred out of state. These criteria were incorporated into DOC's 2007 Out  
of State (Rent-a-bed) Screening Form. Id.

Mr. Novak met the general criteria for out-of-state placement and institution  
staff were asked to interview him to determine his appropriateness for transfer  
out of state. On July 24, 2007, Mr. Novak was interviewed by institution staff  
members Barron and Styles who determined that Mr. Novak met the criteria for  
transfer out of state. Id.

1 Mr. Novak appealed the institution's screening of him for out-of-state  
2 placement asserting that he was still working on his criminal case and that he  
3 wanted to stay in Washington to have more contact with his mother. Mr.  
4 Novak's appeal was responded to on Mr. Thatcher's behalf by DOC employee  
5 Gary Bohon who indicated that the inmates' concerns were noted and would be  
6 taken into consideration. Mr. Novak was determined to be an appropriate  
7 candidate for out-of-state placement and was transferred to Minnesota on or  
8 about August 30, 2007. Mr. Novak has remained in Minnesota since August  
9 2007. Id.

10 Mr. Thatcher had no personal involvement in screening Mr. Novak for  
11 placement in Minnesota or deciding his screening appeal. Mr. Thatcher's review  
12 of the screening documents concerning Mr. Novak indicates to him that Mr.  
13 Novak was appropriately placed out of state and is still appropriate for out-of-  
14 state placement. Mr. Thatcher had no personal knowledge at the time of Mr.  
15 Novak's transfer out of state of any grievance or litigation activity by Mr.  
16 Novak. Mr. Thatcher didn't retaliate against Mr. Novak who was legitimately  
17 screened and selected for out-of-state placement by DOC staff. Id.

18 (Dkt. # 40, pages 2 and 3).

#### 19 STANDARD OF REVIEW

20 Pursuant to Fed. R. Civ. P. 56(c), the court may grant summary judgment "if the  
21 pleadings, depositions, answers to interrogatories, and admissions on file, together with  
22 affidavits, if any, show that there is no genuine issue of material fact and that the moving  
23 party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party is  
24 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
25 showing on an essential element of a claim on which the nonmoving party has the burden of  
26 proof. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985).

There is no genuine issue of fact for trial where the record, taken as a whole, could not  
lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v.  
Zenith Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific,  
significant probative evidence, not simply "some metaphysical doubt."). See also Fed. R.

1 Civ. P. 56 (e). Conversely, a genuine dispute over a material fact exists if there is sufficient  
2 evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the  
3 differing versions of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986);  
4 T. W. Elec. Service Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630  
5 (9th Cir. 1987).

6 The court considers the substantive evidentiary burden that the nonmoving party must  
7 meet at trial, which is “the preponderance of the evidence” in most civil cases. Anderson,  
8 477 U.S. at 254; T.W. Elec. Service Inc., 809 F.2d at 630. The court resolves any factual  
9 dispute or controversy in favor of the nonmoving party only when the facts specifically  
10 attested by the party contradict facts specifically attested by the moving party. Id.  
11 Conclusory, nonspecific statements in affidavits are not sufficient, and “missing facts” will  
12 not be “presumed.” Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990).  
13

#### 14 DISCUSSION

##### 15 A. *Personal Participation.*

16 Plaintiff must allege facts showing that the individually named defendants caused or  
17 personally participated in causing the harm alleged in the complaint. Arnold v. IBM, 637  
18 F.2d 1350, 1355 (9th Cir. 1981). A § 1983 suit cannot be based on vicarious liability alone.  
19 Plaintiff must allege that the Defendants’ own conduct violated the Plaintiff’s civil rights.  
20 City of Canton v. Harris, 489 U.S. 378, 385-90 (1989). A supervisor may be held liable  
21 only “if there exists either, (1) his personal involvement in the constitutional deprivation, or  
22 (2) a sufficient causal connection between a supervisor’s wrongful conduct and the  
23 constitutional violation.” Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir.  
24 1991), *cert. denied* 502 U.S. 1074 (1992). The undisputed facts are that Mr. Thatcher  
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1 played no part in the decision to transfer Plaintiff out of state. On this issue alone,  
2 Defendant Thatcher would be entitled to Summary Judgment.

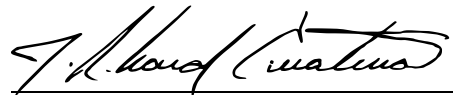
3 B. *Retaliation.*

4 An action taken by prison officials cannot be depicted as retaliation if the action  
5 furthers a legitimate penological goal. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).  
6 Here, Plaintiff fails to contradict Defendants' assertion that hundreds of inmates needed to  
7 be shipped out of state and that Plaintiff met the criteria for out of state placement. Again,  
8 Defendant Thatcher would be entitled to Summary Judgment.  
9

10 CONCLUSION

11 The undersigned recommends that Defendant's Motion for Summary Judgment be  
12 GRANTED and that this action be DISMISSED WITH PREJUDICE. Pursuant to 28 U.S.C.  
13 § 636(b)(1) and Rule 72(b) of the Fed. R. Civ. P., the parties shall have ten (10) days from  
14 service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file  
15 objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn,  
16 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is  
17 directed to set the matter for consideration on September 18, 2009, as noted in the caption.  
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19 Dated this 24<sup>th</sup> day of August, 2009.  
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23 J. Richard Creatura  
24 United States Magistrate Judge  
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